INDEX

	Page
Opinion below	2
Jurisdiction	2
Questions presented	2
Statement	3
A. The indictment	5
B. The scheme to defraud	5
1. Obtaining control of Texas-Adams by use of Texas-Adams funds	5
2. False reports to Texas-Adams stockholders	6
3. Issuance and sale of Texas-Adams stock for nonexistent services and purchases	8
4. Public sales of unregistered stock	9
C. Participation by petitioners	12
1. Worth Pettit, Jr.	12
2. Eugene Meredith	13
3. Leo B. Mittelman	13
Argument	15
1. The indictment	16
2. Alleged inconsistency of the verdict	17
3. The notes and witness sheets prepared by government attorneys	18
4. The court's charge to the jury on character evidence	19
5. The reversal as to three stockbrokers by the court of appeals	20
6. The plea of guilty by defendant McCarthy	20
7. Only single conspiracy was shown	22
8. Admission of evidence of the Worth Investment transaction	22

Argument—Continued Page

9. Cross-examination of Greenberg 22
10. Alleged bias of the trial judge 23

Conclusion 24

Cases:

Campbell v. *United States*, 365 U.S. 85 19
Dunn v. *United States*, 284 U.S. 390 18
Glasser v. *United States*, 315 U.S. 60 15
Holt v. *United States*, 218 U.S. 245 21
Kotteakos v. *United States*, 328 U.S. 750 22
Marshall v. *United States*, 360 U.S. 310 21
Michelson v. *United States*, 335 U.S. 469 19
Palermo v. *United States*, 360 U.S. 343 19
Securities and Exchange Commission v. *Ralston Purina Co.*, 346 U.S. 119 17
Schaffer v. *United States*, 362 U.S. 511 20
United States v. *Falcone*, 109 F. 2d 579, affirmed, 311 U.S. 205 21

Statutes and rules:

Securities Act of 1933, Sec. 4(1), 15 U.S.C. 77d 17
15 U.S.C. 77e(a)(1) 3
15 U.S.C. 77e(a)(2) 3
15 U.S.C. 77x 3
18 U.S.C. 371 3
18 U.S.C. 1341 3
18 U.S.C. 1343 3
18 U.S.C. 3500 ..... 3, 18, 19
F. R. Crim. P., Rule 7(c) 16
F. R. Crim. P., Rule 30 20

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 587

LEO R. MITTELMAN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 588

WORTH PETTIT, JR., PETITIONER

v.

UNITED STATES OF AMERICA

No. 589

EUGENE MEREDITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. No. 587, following p. 64, pp. 2681-2727; VII R. 1-47)[1] is reported at 294 F. 2d 928.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 1961 (Pet. No. 587, pp. 68-69). Petitions for rehearing were denied on November 6, 1961 (Pet. No. 587, pp. 66-67). The petitions for writs of certiorari were filed on December 6, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the incorporation by reference of most of Count 1 into Count 2 rendered the indictment vague or duplicitous.

2. Whether a conviction and acquittal on different counts of a mail fraud indictment involving similar mailings are so inconsistent as to require a new trial.

3. Whether the notes and resulting witness sheets prepared by government attorneys from interviews of witnesses in preparation for the trial, which were neither verbatim nor adopted by the witnesses, were

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[1] Petitioners have filed a record in seven volumes. Volume I was the appendix for defendants Goldberg and Reicher prepared for the court of appeals; it will be designated "I R." Volumes II through V were the joint appendices filed by the government and certain defendants in the court of appeals and will be designated by volume number. Volume VI was the government appendix of exhibits as filed in the court of appeals and will be designated "VI R." Volume VII is in two parts, consecutively numbered, and contains the proceedings in the court of appeals.

subject to inspection by the accused under 18 U.S.C. 3500.

4. Whether the instruction to the jury on character evidence was proper.

5. Whether the reversal of the conviction of conspiracy as to some defendants, for lack of sufficient evidence of criminal intent, required a new trial for the remaining convicted conspirators.

6. Whether the plea of guilty by one defendant during trial, but not before the jury, required a mistrial or a new trial because of newspaper publicity.

7. Whether the evidence showed multiple conspiracies or a single conspiracy.

8. Whether it was unduly prejudicial to petitioners Meredith and Mittelman to admit evidence of an unlawful use of Texas-Adams funds by Pettit alone.

9. Whether the government was properly permitted to cross-examine a hostile government witness.

10. Whether the trial judge showed partiality against the petitioners.

STATEMENT

Petitioners, plus seven individuals and two companies, were indicted in the Southern District of New York on various offenses arising out of a scheme to defraud the stockholders of Texas-Adams Oil Company, Inc. (II R. 1, 36-95). Count I charged a fraud by wire in violation of 18 U.S.C. 1343 (II R. 36-39). Counts 2 through 32 charged mail fraud in violation of 18 U.S.C. 1341 (II R. 39-72). Counts 33 through 49 charged violations of the registration provisions applicable to the Texas-Adams stock, under 15 U.S.C. 77e(a)(1), 77e(a)(2) and 77x (II R. 73-87). Count 50 charged a conspiracy under 18 U.S.C. 371 (II R.

87-95). Not all defendants were charged in all counts (II R. 1).

In a jury trial two defendants were acquitted; petitioner Meredith was convicted on all counts submitted as to him; and petitioners Mittelman and Pettit were acquitted on some counts and convicted on others (II R. 25). The conviction of three defendants and their brokerage company, acting as brokers as distinguished from principals, was reversed by the court of appeals after review of the record on the ground that there was insufficient proof to go to the jury on wilfulness and criminal intent (VII R. 19).

Petitioner Meredith, who was convicted on 36 counts, was sentenced to 5 years' imprisonment; a second 5 year consecutive sentence was suspended, and he was placed on 5 years' probation to commence at the end of the prison sentence (II R. 27-28). Petitioner Mittelman, convicted on two counts, was sentenced to 5 years' imprisonment; a second 5 year consecutive sentence was suspended, and he was placed on probation for 5 years (II R. 30). Petitioner Pettit, convicted on 24 counts, was sentenced to imprisonment for 3 years; a second 3 year consecutive sentence was suspended, and he was placed on probation for 3 years to begin at the end of the prison sentence (II R. 29-30).[2]

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[2] Defendant McCarthy, who pleaded guilty (*infra*), was sentenced to 3½ years' imprisonment, a $10,000 fine, and 3½ years probation (II R. 26-27). Defendant Crosby was sentenced to 5 years' imprisonment and probation for 5 years (II R. 28-29). Defendant Texas-Adams Oil Company, Inc., was fined $1.00 which was remitted (II R. 32).

There is little disagreement as to the basic facts as distinguished from their interpretation and relevance. The pertinent facts may be summarized as follows:

A. The Indictment

The indictment charged a scheme to defraud the stockholders of a corporation by gaining control, in part by use of the corporation's own funds; then increasing the authorized shares and issuing these to pay for nonexistent services and to purchase property of little or no value; freely selling these shares while illegally representing the shares as exempt from registration under S.E.C. regulations; and falsely representing the growth and value of the corporation. The execution of this scheme involved a conspiracy, the use of an interstate wire, and the use of the mail to deliver false reports and to sell unregistered stock unlawfully (II R. 36-95).

B. The Scheme to Defraud

1. Obtaining Control of Texas-Adams by Use of Texas-Adams Funds

As the result of an advertisement seeking control of a company which had issued stock to the public, Texas-Adams agreed to sell 283,000 of its shares for $105,000 to a group including defendants McCarthy and Crosby and petitioner Pettit. The down payment was to be $45,000 in exchange for 60,000 shares on September 27, 1955, with the remaining shares to be held in escrow pending future installment payments (II R. 261-269, IV R. 1337, 1352). Of the cash needed to purchase control, $40,300 came from a Mr. Spiotta, but only after $42,000 had been placed in his account in New Jersey (II R. 182-186). Ar-

rangements for this $42,000 were made the day before by opening in a New Jersey bank three accounts in the names of Texas-Adams, Sundown Oil Company, and the American Montana Oil & Gas Corporation, and preparing transfers so that when $51,700 was transferred to the Texas-Adams account, $42,000 would end up in Mr. Spiotta's account after passing through the other companies (II R. 212-227). The $51,700 was transferred from the New York Texas-Adams account (II R. 243-252, 290). The remaining funds needed to gain control—$4,700—were supplied by petitioner Pettit, who was subsequently reimbursed (II R. 237-242, 294). The complicated disbursement had been previously outlined in an Agenda, Govt. Ex. 18-A (VI R. 6-9).

2. *False Reports to Texas-Adams Stockholders*

(a) *Ajax Oil Company Properties*

On November 25, 1955, Texas-Adams reported to its stockholders that a contract to purchase certain oil and gas leases from Ajax Oil Company was signed "and may be considered closed pending clearance of titles and abstracts to the properties" (VI R. 10). The actual facts were these. Ajax Oil had offered in July 1955 to sell the leases for $1,250,000 to defendant McCarthy and petitioner Mittelman acting in behalf of a company known as Sundown Oil. After Sundown proved unable to obtain more than the $50,000 down payment despite a series of intricate intercorporate maneuvers [3]—which led to further misrepre-

[3] To obtain the $50,000 for Ajax, arrangements were made to have Homestead Oil & Uranium Company advance the money based upon a proposed merger between Homestead

sentations to Texas-Adams' stockholders[1]—and after McCarthy and his associates had obtained control of Texas-Adams, a supplemental agreement was drawn to substitute Texas-Adams for Sundown with respect to the purchase of the Ajax property. The agreement was never executed; no payment beyond the initial $50,000 paid by Sundown was ever made; and the Ajax property was never transferred (III R. 584-587).

(b) *Osage Mining Company and the Longview Properties*

In November 1955, Texas-Adams reported to its shareholders that the company had acquired certain Longview property for $300,000 and 850,000 shares of stock, and had secured the Osage Mining Co., which "has $300,000 in cash and a producing feldspar mine," for 375,000 shares of stock (VI R. 10-11). The actual facts were that, while petitioner Pettit and defendant McCarthy had earlier obtained an option to purchase certain oil and gas leases near Longview, Texas (III R. 814-817), the Longview property was never purchased. Moreover, the principal asset of the Osage Mining Company, a lease

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and Sundown into Dumont Marine & Instrument Company (II R. 329-330). Homestead's unsold stock was "purchased" by petitioner Mittelman through an indirect "loan" of $90,000 from Homestead's treasury (III R. 526-532). The proposed merger with Dumont and another attempted merger were not successful.

[1] Homestead was merged with Texas-Adams in February 1956, on the basis of an exchange of stock (II R. 348-352). Texas-Adams reported to its stockholders that Homestead had $140,000 on November 25, 1955, but this was not true (II R. 353; VI R. 10).

of a water-filled mine, was never in fact transferred to Texas-Adams (III R. 900-901, 942-943).

3. ***Issuance and Sale of Texas-Adams Stock for Non-existent Services and Purchases***

(a) *Transactions Nominally with George Jannis*

Texas-Adams issued 132,000 shares of its stock to one George Jannis for "monies advanced" and "services rendered," and in full payment for 1,300,000 shares of Homestead Company. George Jannis worked for defendant Crosby, driving his car, working as a butler or "whatever he wanted" (III R. 651). Jannis never loaned money nor rendered services to Texas-Adams nor did he own the Homestead stock purportedly purchased from him (III R. 664-665, 711-712). These shares were always listed on the Homestead books in the name of petitioner Mittelman (III R. 569).

(b) *United States Sulphur Company, Inc.*

United States Sulphur Company, which never produced any sulphur, was "sold" to Texas-Adams for 250,000 shares of Texas-Adams stock, but the local property records reflected no transfer of the company's major asset, a "sulphur" lease (IV R. 1311-1317, 1391). An additional 150,000 shares of Texas-Adams stock were issued to L. W. Limited, a Canadian corporation whose vice president was petitioner Mittelman, as "part payment" for U. S. Sulphur Company, Inc. (VI R. 52-53; IV R. 1342-1345). The president of U. S. Sulphur had never heard of L. W. Limited (IV R. 1316).

4. *Public Sales of Unregistered Stock*

(a) *The George Jannis Transaction*

In connection with the purported issuance of 132,000 shares of Texas-Adams stock to George Jannis (*supra*, p. 8), petitioner Mittelman wrote three opinion letters to the Texas-Adams transfer company stating that the corporation's minutes and agreements had been examined and that the issue was exempt from registration and legally issued for a valid consideration (VI R. 20-25). The government traced almost all of the issue through various brokers to the public (Govt. Ex. 67; III R. 713-714; IV R. 1069-1071).

(b) *Osage Mining Company and the Longview Lease*

In connection with the purchase of the Osage Mining Company and the Longview, Texas, leases (*supra*, pp. 7-8), it was decided to use 375,000 shares of Texas-Adams stock—75,000 shares for the Osage mine and 300,000 shares issued to Osage but to be sold to provide funds to purchase the Longview Oil property (III R. 889). Petitioner Meredith prepared a draft form letter that these shares would be held for investment (V R. 1667-1668).

Texas-Adams actually issued 650,000 shares to purchase Osage through American Montana (III R. 838-842), and their public distribution was traced by the government (V R. 1572-1576). Texas-Adams also issued an additional 190,000 shares for this purchase through an Alabama Transfer Company (III R. 890-891, 900, 906).

(c) *Empire Drilling Company*

In November 1955, petitioner Pettit arranged to purchase all the stock of Empire Drilling Company for 150,000 shares of Texas-Adams stock (IV R. 1121, 1124-1125). Financing of Empire had been obtained by selling working interests in leases (IV R. 1123). Empire advised defendant McCarthy and petitioner Pettit that the S.E.C. had suggested that the failure to register might be a violation of law and Empire had ceased selling such interests (IV R. 1123-1125). Later arrangements were made to exchange the holdings of the 381 interest-holders for Texas-Adams stock (IV R. 1127-1130; V R. 1579) and to supply 500,000 shares for creditors (VI R. 37).

Petitioner Mittelman wrote an opinion letter stating he had examined all the documents and papers and that the issuance of 3,150,000 shares of Texas-Adams stock for the assets of Empire was exempt (VI R. 40-41). Petitioner Mittelman also obtained a similar opinion letter from Francis J. Purcell, a former Regional Administrator of the S.E.C. in New York, without advising him that the stock would be used to acquire the interests held by individuals in leases (IV R. 1249, 1265; VI R. 42-45).

In February 1956, when Purcell first heard of the exchange with interest-holders, he and petitioner Mittelman told S.E.C. officials that they would recommend that a registration statement be filed and the offering be discontinued immediately (IV R. 1266-1268, 1242). However, petitioner Mittelman told Empire to complete the exchanges in process, and

petitioner Meredith continued to make exchanges (IV R. 1141-1144). No registration was ever filed for Texas-Adams (II R. 171).

To prevent sales by interest-holders of Texas-Adams stock from depressing the price, petitioner Meredith instructed Empire that they could guarantee the interest-holders $1 per share of Texas-Adams stock (IV R. 1146-1148). Many interest-holders who turned in their stock received either nothing or part payment in return (IV R. 1284-1287, 1290-1293, 1295-1296). An escrow was set up in Denver, which paid brokers two free shares for each share purchased at $1 (III R. 903-905; V R. 1537-1541).

(d) *Comigu*

On February 23, 1956, Texas-Adams obtained an option to purchase the assets of Comigu (abbreviated name of a French Guiana organization, see IV R. 1434) and an option to purchase 20 research permits for 2,000,000 shares of Texas-Adams stock (VI R. 56-58; Govt. Ex. 167-A). On March 9, 1956, defendant McCarthy and petitioner Mittelman exercised only the option for the research permits (VI R. 59; Govt. Ex. 167-B). Petitioner Mittelman wrote an opinion letter stating the 2,000,000 shares were exempt from registration as used to acquire assets (VI R. 60-61; Govt. Ex. 168-B; cf. Govt. Ex. 175-B; VI R. 66-67).

Part of these shares were sold to the public (IV R. 1400-1401, 1408; V R. 1563; VI R. 64-65; Govt. Ex. 175-A) and part used in the escrow for brokers who purchased shares of Empire, *supra* (V R. 1540-1541).

C. Participation by Petitioners.

We briefly summarize only the salient portion of the activities of those defendants who are petitioners: [5]

1. *Worth Pettit, Jr.*

Petitioner Worth Pettit, Jr. was a director and Vice President of Texas-Adams (VI R. 3; III R. 882). He took part in the arrangements to take control of Texas-Adams (II R. 211, 237-238, 241-242, 246, III R. 836) and his initials appear on the Agenda of operations (Govt. Ex. 18-A; VI R. 6-9). He and McCarthy were named as the transferees of 500,000 shares of Homestead which were initially purchased by Mittelman through an indirect "loan" from Homestead's treasury (III R. 568-570; see *supra*, n. 3, p. 7). He was one of the "main" participants in the Longview transaction (III R. 834, see also 814, 816, 822-827). He used $50,000 of Texas-Adams' proceeds to set up the Worth Investment Company of which only $30,000 was returned to Texas-Adams (IV R. 1099-1107). Part of the proceeds of the sale of Texas-Adams stock which was to be used to purchase the Longview leases was diverted to a friend of Pettit (III R. 1009-1010; IV R. 1143; *supra*, p. 9). He participated in the meeting to provide a bonus of two free shares of Texas-Adams stock to brokers for each share purchased

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[5] McCarthy was a Director and President of Texas-Adams and Crosby was a director and Secretary-Treasurer of Texas-Adams (VI R. 1-5). Neither is a party at this stage of the litigation.

from Empire interest holders (V R. 1536-1539). See also the summary in the charge to the jury (I R. 318-320).

2. *Eugene Meredith*

Petitioner Eugene Meredith was elected a vice-president of Texas-Adams (V R. 1620). He was the only petitioner to testify (V R. 1616). Meredith, who had prepared the draft form letter to hold the "Osage" shares for investment, had the certificate broken down for sale by the Alabama Transfer Company and then delivered the same certificate to be broken down by the Corporation Trust Company (V R. 1665-1668). He told Empire to guarantee its interest holders $1 per share for Texas-Adams stock and negotiated exchanges after Mittelman and Purcell told Empire to stop (IV R. 1142-1148). He participated in the escrow arrangement to provide two free shares of Texas-Adams for each share purchased (V R. 1540-1541). He furnished material for a press release on Empire Drilling Company (IV R. 1136-1141), suggested people to whom the material should be sent (V R. 1517), and gathered material for a publicity brochure (V R. 1492-1494). He told Empire interest holders of the holdings of Texas-Adams and gave out literature (IV R. 1285, 1292, 1298). He participated in the negotiations for United States Sulphur Company (IV R. 1311). See also the summary in the charge to the jury (I R. 310-312).

3. *Leo B. Mittelman*

Petitioner Leo B. Mittelman, a lawyer, participated in the early Ajax and Homestead projects. Part of

petitioner Pettit's funds for purchase of control of Texas-Adams passed through Mittelman's bank account (III R. 571; II R. 330-331; 293-295). He told Holland, the head of Homestead, that he was a member of the McCarthy group and he and Holland were designated co-signers on Homestead's bank in Billings, Montana (II R. 337). He purchased 1,800,000 Homestead shares on an indirect loan from Homestead itself (III R. 529-531), of which 1,300,000 shares remained in his name throughout the period involved (III R. 569).

He wrote an opinion, "hav[ing] examined all the necessary papers", providing for the issuance of 52,000 shares of Texas-Adams to George Jannis for the acquisition of these 1,300,000 Homestead shares (VI R. 24-25). He also went with Jannis to Stratford Factors to redeem these 1,300,000 Homestead shares (which had been hypothecated) for 20,000 shares of Texas-Adams stock, and did not turn the shares over to Jannis (III R. 665-671; IV R. 1456-1458, 1473-1478). Subsequently, he paid Stratford Factors and then sold 7,500 shares of the 20,000 Texas-Adams' shares in the name of his sister (III R. 645-650; IV R. 1458, 1478-1479; VI R. 16-19).

He wrote the opinion letter regarding the issuance of Texas-Adams stock to purchase the assets of Empire Drilling and obtained a similar one from Francis J. Purcell (VI R. 40-45). He also wrote letters regarding the interest holders exchange (VI R. 50-51), but did not so inform Purcell until they went to Denver to discuss the issue with the S.E.C. (IV R. 1263-1267, see also 1301-1308).

He wrote an opinion letter concerning the issuance of 250,000 shares of Texas-Adams to purchase "all of the assets" of United States Sulphur Company (VI R. 54-55). He later wrote a letter for the issuance of 150,000 shares of Texas-Adams' stock to be put in the name of L. W. Limited, as "part payment" of the purchase price of U.S. Sulphur Company, Inc. (VI R. 52-53). L. W. Limited was a Canadian corporation, of which the president of U.S. Sulphur had never heard, and which had been organized with Mittelman as vice-president (IV R. 1316, 1342-1345, 1379-1381). See also the summary in the charge (I R. 312-317).

ARGUMENT

While not denominated a question presented, each petitioner argues that under the evidence he was not guilty. Pettit claims "he participated to a limited extent in legitimate business negotiations" and was "the most aggrieved victim of McCarthy's folly" (Pettit, Pet. 8). Meredith claims he merely signed papers and "ran errands" (Meredith, Pet. 6). Mittelman claims his case rests in large part on testimony of witnesses "whose testimony involved perjury" and describes one government witness as "a swindler and liar" (Mittelman, Pet. 13, 30). The short answer is that these are matters settled by the jury. Meredith, who took the stand, clearly was not believed. Mittelman, who did not take the stand, cannot now rely on his brief to explain his actions. After conviction, evidence should be viewed with the inferences in favor of the government. *Glasser* v. *United States*,

315 U.S. 60, 80. Here the evidence fully supports the verdict that the scheme was fraudulent. The jury which observed the witnesses was most careful (in two evenings and one day of deliberations), as evidenced by the acquittal of two defendants and the acquittal of other defendants on certain counts. The scheme, always based on the use of other people's money—involving insider profits (Empire, U.S. Sulphur), kickbacks (Jannis, Osage Mining), and wholesale misrepresentation—was so blatantly fraudulent that the jury could properly conclude that none of these three petitioners, who were so closely connected with it, could have been innocent. It is in the light of the obvious strength of the government's case that petitioners' legal arguments should be viewed.

1. The indictment.

Petitioners Meredith (Pet. 2-3, questions 1-4) and Mittelman (Pet. 3, questions 1 and 2, 41-45) make general attacks on the indictment, but it is plain that the indictment clearly charged the elements of the crimes. The fact that Count 2 incorporated by reference most of the paragraphs of Count 1 does not create duplicity. Such pleading is specifically recognized by Rule 7(c) F. R. Crim. P. Nor is duplicity created by the fact that various means, which violate more than one statute, are used to fulfill the scheme. The wire fraud in Count 1 and the mail fraud in Count 2 do not make the schemes "separate" (Mittelman, Pet. 42) but only the crimes separate. The mere fact that petitioner Mittelman was not charged by the grand jury in Count 1 does not mean the evi-

dence was not admissible against him, since the allegations of paragraphs 2 through 5 of Count 1 were specifically incorporated by reference in Count 2 (paragraph 2) in which Mittelman was charged (II R. 40).

Petitioner Mittelman also contends that the part of the indictment charging failure to register is invalid because transactions "not involving any public offering" are exempt under Section 4(1) of the Securities Act of 1933, 15 U.S.C. 77d, and, he argues, "public offering" is too vague and uncertain a term to support a criminal conviction. This argument is specious. The words read in their normal sense make it clear that stock intended to be sold to the general public, as here, would be a public offering. In addition, as the court below pointed out, this Court's decision in *Securities and Exchange Commission* v. *Ralston Purina Co.*, 346 U.S. 119, 125, made it clear that only an offering "to those who are shown to be able to fend for themselves is a transaction 'not involving any public offering.' " The facts of this case aptly demonstrate that the people who bought Texas-Adams shares, including the Empire interest holders, had no protection of the kind which would have been provided by registration.

2. Alleged inconsistency of the verdict.

Petitioner Mittelman was convicted on Count 2 of mailing on November 30, 1955, a false stockholders report to Ethel Davis Lake for the purpose of executing the fraudulent scheme (II R. 39-50). He was acquitted in Count 12 of mailing a similar report, on

December 2, 1955, to Solomon Bloom (II R. 57-62). Mittelman claims these verdicts are inconsistent, and, recognizing that inconsistency has been held insignificant in *Dunn* v. *United States*, 284 U.S. 390, asks this Court for "reconsideration" of that decision (Mittelman, Pet. 45-47). There is no occasion to reconsider *Dunn* in the context of a mail fraud indictment involving one scheme and multiple mailings. Whether acquittal on particular counts represents the jury's conclusion that connection with a particular mailing was not shown or merely a degree of lenity, acquittal on any one count does not suggest lack of conviction as to guilt.

3. The notes and witness sheets prepared by government attorneys.

Petitioners' argument that they were not supplied with the notes of interviews of witnesses and the resulting witness sheets prepared by the government attorneys is an unwarranted effort to extend the scope of 18 U.S.C. 3500.[8] Both government attorneys testified on *voir dire* that they interviewed witnesses in preparation of the case and sometimes made notes. These notes were usually destroyed, routinely, when the matters had been incorporated in a witness sheet. None of the notes were verbatim and none were de-

[8] The defense was given literally hundreds of pages of testimony of witnesses, consisting of grand jury minutes, proceedings before the referee in bankruptcy, a reported investigation conducted by the Attorney General of New York State, and various interviews of postal inspectors (*e.g.*, II R. 338-340, 369, III R. 915-916, IV R. 1032-1034, 1360).

liberately destroyed. The trial court examined witness sheets and notes *in camera* and found they did not come within the purview of 18 U.S.C. 3500 (see *e.g.*, II R. 404-447, IV R. 1084-1095, V R. 1808-1810).

Certainly, the statute was not intended to change the normal working habits of trial lawyers and require that they keep and produce miscellaneous notes, impressions, and "memory-joggers" used to prepare witness sheets, which are used in turn to examine witnesses at trials. The notes here were not a substantially verbatim record nor statements adopted by the witnesses. After a full *voir dire* they were properly held not producible. *Palermo* v. *United States*, 360 U.S. 343; *Campbell* v. *United States*, 365 U.S. 85.

4. **The court's charge to the jury on character evidence.**

Petitioner Mittelman, who had character witnesses, complains that the charge to the jury on reputation contained a "subtle suggestion" that the accused had deceived his friends (Mittelman, Pet. 50-52).

Any such suggestion was completely neutralized, so far as character evidence was concerned, by the court's broader instruction that character evidence is not a witness' personal opinion of character but constitutes a description of the defendant's reputation. *Michelson* v. *United States*, 335 U.S. 469, 477. Moreover, the charge informed the jury that character evidence may, in itself, create a reasonable doubt of guilt (I R. 160-161). Finally, petitioner did not ex-

cept to this charge as is required by Rule 30, F.R. Crim. P.

5. The reversal as to three stockbrokers by the court of appeals.

All petitioners complain that, because the court of appeals dismissed the indictment against the three brokers for lack of evidence of criminal intent, the court should have ordered a new trial for these management petitioners, who might otherwise be prejudiced by the admission of evidence not admissible against them alone (Pettit, Pet. 13-14; Meredith, Pet. 15; Mittelman, Pet. 52-56). However, the evidence relating to the brokers which would have been inadmissible had the brokers not been defendants was minor when compared to the overwhelming evidence relating to petitioners and thus in this extended trial was plainly not prejudicial.

Petitioners' citation of *Schaffer* v. *United States*, 362 U.S. 511, is inapposite. There, the problem involved the right to charge and try individuals in different counts, once the conspiracy charge was dismissed. Here, the conspiracy charge was never dismissed. The mere fact that some persons charged as conspirators are not convicted does not require a new trial as to the others.

6. The plea of guilty by defendant McCarthy.

All petitioners contend that, because of the guilty plea by defendant McCarthy, and the attendant newspaper publicity, they should have been granted a new trial (Pettit, Pet. 9; Meredith, Pet. 15; Mittelman, Pet. 61-62).

Shortly after the trial began, defendant McCarthy pleaded guilty outside the hearing of the jury (II R. 198-208). The trial court cautioned the jury generally not to read newspapers (II R. 227). It refused the request by one defense counsel (opposed by others) to ask the jurors to report if they obtained outside information pertinent to the case (II R. 227-230). At the end of the trial the court made inquiry of defense counsel as to how to handle the matter and most counsel wanted nothing special said (V R. 1820-1822). During the charge the court merely stated that McCarthy was no longer on trial and instructed the jury to consider the guilt or innocence of each defendant separately (I R. 161, 158, 330-331). After the jury verdict finding certain defendants guilty, one counsel filed an affidavit stating that a juror had told him that the jury knew of McCarthy's plea of guilty, but the juror refused to give a written statement to that effect (V R. 1877-1897). The court denied the motion for a new trial thereon (V R. 1874).

Whether to grant a new trial because of newspaper publicity is a matter for the discretion of the trial court and depends upon the circumstances of each case. *Holt* v. *United States*, 218 U.S. 245; *Marshall* v. *United States*, 360 U.S. 310. In this case, McCarthy's guilty plea could have been taken in front of the jury. *United States* v. *Falcone*, 109 F. 2d 579 (C.A. 2), affirmed, 311 U.S. 205. Hence, the careful admonition and charge to the jury were sufficient.

7. Only a single conspiracy was shown.

All petitioners claim that the proof showed multiple conspiracies, citing *Kotteakos* v. *United States*, 328 U.S. 750. However, as appears from the facts outlined in the Statement, *supra*, this case involved one integrated scheme—in which the conspirators lacked financing except for the money supplied by uninformed stockholders, and petitioners took action resulting in profits to the conspirators through insider profits and kickbacks. All these petitioners knew each other and played complementary roles in this one general conspiracy.

8. Admission of evidence of the Worth Investment transaction.

Petitioners Meredith and Mittelman complain of the admission of evidence as to the unlawful use of Texas-Adams money by petitioner Pettit to set up the Worth Investment Co. (see the Statement, *supra*, p. 12). This type of personal use of the stock of Texas-Adams or its proceeds was clearly contemplated in this scheme, and the evidence was thus admissible against all. Moreover, this particular complaint is totally without merit since, at the specific request of defense counsel, the court instructed the jury in the charge to consider the evidence only as against Pettit and not the other defendants (V R. 1846). The same is true of the Crosby-Jannis letter (I R. 213-214).

9. Cross-examination of Greenberg.

Petitioners object to the fact that the trial court permitted the government to cross-examine one of its

witnesses who did not testify . . he had previously indicated and was hostile. Witness Greenberg had told the postal inspectors that he had received some stock in Jannis' name from Gordon, a New York broker, to be sold in Canada (VI R. 68-71). At the trial he testified that one Dawson, who had died in the meantime, had given him the stock (III R. 777-782). On examination he stated he did not discuss with the inspectors the source of the certificates and he thought the talk was "off the record" (III R. 786). Then he said he did not recall, and then "I imagine they did ask * * *." (III R. 787). In these circumstances the witness was properly treated as hostile. The trial judge at the time carefully explained to the jury that any statements by counsel in questions were not evidence (III R. 804).

10. Alleged bias of the trial judge.

Petitioners' complaint of the attitude of the trial judge is not supported by the record. Most of the instances cited by petitioners were brought about by a long trial which required strong control by the judge. As the court below noted (VII R. 29-30), Mittelman's attorney "had consistent difficulty in marshalling his relevant facts" which resulted in an inordinately long, repetitious trial which presented difficult problems of control. The trial court's activities did not show bias in any way.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
THEODORE G. GILINSKY,
Attorneys.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 587

LEO B. MITTELMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING OUT OF TIME

EDWARD M. GARLOCK,
Attorney for Petitioner,
521 Fifth Avenue,
New York 17, New York.

Supreme Court of the United States

OCTOBER TERM, 1961

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LEO B. MITTELMAN,

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UNITED STATES OF AMERICA,

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TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING OUT OF TIME.

On the annexed affidavit of the undersigned petitioner respectfully moves for leave to file out of time the petition for rehearing submitted herewith.

Dated: April 7, 1962.

EDWARD M. GARLOCK,
Attorney for Petitioner,
Office & P. O. Address,
521 Fifth Avenue,
New York 17, N. Y.

Supreme Court of the United States

OCTOBER TERM, 1961

No. 587

LEO B. MITTELMAN,

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v.

UNITED STATES OF AMERICA,

Respondent.

AFFIDAVIT IN SUPPORT OF THE MOTION.

SOUTHERN DISTRICT OF NEW YORK }
COUNTY AND STATE OF NEW YORK } ss:

EDWARD M. GARLOCK, being duly sworn, deposes and says:

(1)

I now represent petitioner in this cause, and my notice of appearance will be filed herewith. This affidavit is submitted in support of petitioner's motion for leave to file the annexed petition for rehearing out of time.

(2)

The Court's attention is respectfully directed to the fact that the annexed petition is based on the prosecution's admitted and knowing use of false and prejudicial testimony against petitioner—a fact that can hardly fail to influence the discretion to which the motion is addressed.

(3)

The petition for a writ of certiorari was denied on February 19, 1962; and the time to file a petition for rehear-